Supreme Court, U.S.
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No. 93-892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NTA GRAPHICS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S OPPOSITION TO MOTION TO VACATE AND REMAND

TIMOTHY C. MCCARTHY *
SHUMAKER, LOOP & KENDRICK
North Courthouse Square
1000 Jackson
Toledo, OH 43624-1573
(419) 241-9000

JOSEPH R. DAMATO
LAWRENCE P. POSTOL
RONALD A. LINDSAY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for Petitioner

* Counsel of Record

Dated: May 24, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioner NTA Graphics, Inc. ("Company") respectfully requests this Court to deny the motion of the National Labor Relations Board ("Board") to vacate the judgment of the court of appeals as moot. There remains a substantial controversy between the Board and the Company that merits resolution by this Court.

1. The Board's predicate for claiming mootness is the disclaimer of interest sent to the Company by representatives of Graphic Communications International Union, Detroit/Toledo/Lansing Local 289, AFL-CIO-CLC ("Union"). However, this disclaimer does little to attenuate the controversy between the parties. The disclaimer prevents the Union from representing employees in the previously-certified bargaining unit for, at most, six months. *E.g., Richmond Motor Car Dealers Ass'n,* 116

N.L.R.B. 1761 (1956). The disclaimer does not preclude the Union from again requesting the Board to certify it as the exclusive representative of the Company's pressroom employees after an elapse of six months, nor does the disclaimer preclude other labor organizations from demanding recognition—at any time—as the exclusive representative of employees in the disputed pressroom unit. *See, e.g., Hartz Mountain Corp. v. Dotson,* 727 F.2d 1308 (D.C. Cir. 1984) (after one union disclaimed interest another union successfully petitioned for an election in the same bargaining unit).

2. In any event, as the Board itself concedes, the issue to be resolved in this case is not whether *this* Union is entitled to represent the Company's employees, but whether "the Board's determination of a separate bargaining unit of pressroom employees . . . constitutes an abuse of discretion." Board Motion to Vacate at 2. This is a live issue for, absent a contrary directive from this Court, the Board will follow its bargaining unit determination in the instant case and in *Continental Web Press, Inc.*, 262 N.L.R.B. 1395 (1982), *enf. denied* 742 F.2d 1087 (7th Cir. 1984), when this Union or another labor organization demands recognition as the representative of the Company's pressroom employees. The Board has not disavowed *Continental Web Press.* Furthermore, the Board traditionally looks to its prior bargaining unit decisions with respect to a particular employer when making subsequent bargaining unit determinations for that employer, *see, e.g., Michigan Bell Telephone Co.*, 217 N.L.R.B. 428 (1975), and the Board follows this practice even when no certification resulted from the prior bargaining unit determination. *E.g., Esgro Anaheim, Inc.*, 150 N.L.R.B. 401, 402, 407 (1964) (Board orders election in same units in which union lost previous election). Accordingly, vacation of the Union's certification in the instant case diminishes only slightly the likehood that the Company will be forced to deal with an inappropriate bargaining unit.

3. One way this case could be mooted is if the Board were to confess error and renounce its decisions in *Continental Web Press* and the instant case (or, at the very least, rationally explain why in these cases it deviated from its traditional rule concerning bargaining units in the lithographic printing industry). In a case cited by the Board in its motion, *Mechling Barge Lines v. United States*, 368 U.S. 324 (1961), this Court held that a case involving the Interstate Commerce Commission was mooted because "the Commission has, on this appeal, conceded that it is obliged to make findings and that the challenged order is fatally defective because no supporting findings were made," and, furthermore, the Commission "represent[ed] that it has amended its practice accordingly." *Id.* at 330. The Board has not made any similar admission nor provided any similar reassurance with respect to its erroneous determinations in *Continental Web Press* and the instant case.

4. Therefore, this case in its present posture is akin to labor cases such as *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 153 n.5 (1983) and *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121-27 (1974), which this Court regarded as presenting actual controversies even though the employers in those cases were no longer confronted with any injurious conduct when the cases were before the Court. In both cases, government agencies had adopted and maintained positions that threatened harm to the employer's interests. The Court concluded that the cases were not moot because of the expectation that the challenged conduct would recur in the future, even though there was no certainty that there would be another occasion for the government agencies to apply their disputed policies. As the Court said in *McCorkle*, "the challenged government activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." 416 U.S. at 122.

Similarly, in the instant case the Board's refusal to adhere to settled principles of administrative law when making bargaining unit determinations provides a sufficient basis for concluding that the case is not moot.

5. As if the foregoing were not sufficient to deny the Board's motion, conclusive proof of this case's vitality is provided by the Board's own decision in *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. 936 (1988). In that case, the employer argued that a union's disclaimer of interest mooted a Board bargaining order. The Board rejected the employer's contention, reasoning that another union might seek to represent the employees. The Board concluded that an order still effectuated the policies of the Act as the employer had "an obligation to bargain in good faith with *any* other labor organization that is duly selected by the unit employees to represent them." *Id.* at 936 n.1 (emphasis added). The Board has not, and indeed cannot, explain why a disclaimer of interest moots this case, but did not moot the controversy in *Wells Fargo*. Industrial relations have not changed so much in six years that what the Board considered a realistic probability in 1988 now can be ignored as unduly speculative.

6. It is because the Company can predict with some confidence that it has not seen the end of union bargaining demands that it is compelled to see this litigation through to the end. In its disclaimer, the Union shed crocodile tears over the funds expended by the Company in contesting a Board order that created an inappropriate, unworkable bargaining unit out of the Company's pressroom. Appendix to Board Motion to Vacate at 3a-4a. The Company has expended a considerable amount of money, and precisely for that reason it will be unable to sustain another multi-year ordeal of litigation if the judgment below is vacated as moot and the Union, or some other labor organization, appears at the Company's door this fall requesting bargaining in an inappropriate unit. The Union's disclaimer does not bind the Board, does not bind other labor organizations and binds the Union for

only another five months. Absent a Board decision repudiating its bargaining unit determination in this case, this case has not been mooted.

Therefore, the Court should deny the Board's motion.

Respectfully submitted,

TIMOTHY C. MCCARTHY *
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Toledo, OH 43624-1573
(419) 241-9000

JOSEPH R. DAMATO
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